attractive to shoppers and residents can be thwarted if any tenant (or landowner) with impunity can place large numbers of microwave type dishes on a building or property.

In addition, the Commission should be aware that local units of government in addressing these matters are not balancing rights versus wrongs, they are balancing rights versus rights to see that needed services are provided yet are least disruptive or harmful to the community, its residents and property values. For these reasons zoning has been identified by the Supreme Court repeatedly (see below) as being peculiarly of local concern on which the Commission and other Federal agencies may not trespass.

As is apparent from the preceding description, depending on local conditions, in some communities or in some significant portions of communities there may be no zoning restrictions at all on antennas of a fixed wireless nature. In other places there may be some restrictions whose exact nature and the process to implement them will vary significantly depending upon the values being addressed and the procedures of the local community. A key point is that in zoning and land use decisions local units of government are insuring that the communications needs of their residents are met--as well as insuring that other needs are met.

C. **No Demonstrated Problem**: The most notable feature of the comments submitted to the Commission in this proceeding is that although some support the extension of Rule 1.4000 to preempt local zoning there is not a single instance or example given of zoning having restricted or affected the provision of fixed wireless telephone services. Without there being a demonstrated problem there is simply no basis upon which the Commission can (or should) act.

CCO suggests that one of the likely reasons that there is no demonstrated problem is that problems, if any, have been few and far between. The likely reason is that the buildings to be served

by fixed wireless service are predominantly office buildings and apartment buildings, located (respectively) in areas zoned commercial and multi-family residential. The zoning laws for commercial areas and multi-family residential areas are usually somewhat less restrictive than for single family residential areas (which typically have the most restrictive zoning regulations).

As with safety codes, the burden is on the industry to demonstrate what zoning problems there are, their severity and frequency, not for CCO and other local units of government to show the reverse. Specifically, it is up to the industry to create a record showing that in the over 30,000 local units of government nationwide that zoning problems affecting fixed wireless facilities are of a sufficient frequency and severity to warrant Commission action. The industry has had ample time to do this, but has brought forth nothing.

The bottom line is that the Commission cannot act without a demonstration of a significant, national problem. No such problem has been shown.

D. Zoning and Federal Property: As described above, the GSA requires that private wireless devices placed on Federal property must comply with state and local laws. This includes zoning laws.

Thus, for example, the Federal government owns immense amounts of property, particularly in the western United States (where it owns more than fifty percent (50%) of the land area of some states); is the dominant land owner in the Washington D.C. area; and elsewhere (particularly where there are major military installations) owns substantial amounts of real estate and buildings (such as in or near major cities such as San Diego). It would be a perverse and unlawful result if local zoning laws applied to private wireless dishes placed on Federal property in these instances but were wholly or partially preempted as to adjacent private properties. Such a result would lack any rational

basis and would be arbitrary, capricious, and an abuse of discretion..

E. **Commission Lacks Zoning Preemption Authority**: Several commenters effectively claim that the Commission has the statutory authority to preempt local zoning for fixed wireless antennas. In fact the Commission lacks such authority.

1 **Section 332 (c)(7)**: Section 704 of the 1996 Act added Section 332 (c) (7) titled "Preservation of Local Zoning Authority" to the Communications Act of 1934. Section 332 (c) (7) starts out by providing:

> "(A) Except as provided in this paragraph nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction and modification of personal wireless service facilities." (emphasis supplied)

Due to the phraseology "nothing in this Act" the local authority preserved by Section 332 supercedes any other claimed basis for Commission preemption authority elsewhere in the Communications Act. So as to any matters within the scope of Section 332 (c) (7) the Commission lacks preemption authority.

The matters within the scope of Section 332 (c) (7) are "personal wireless service facilities" which are defined in Section 332 (c) (7) (C) as including "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 47 USC Section 332 (c) (7) (C).

Industry commenters admit that where they provide wireless common carrier exchange services (as many will) that they are squarely covered by Section 332 (c) (7). See e.g., Comments of Teligent, Inc at 47.

But other industry commenters attempt to evade the plain language of Section 332 (c) (7) .

For example the Wireless Communications Association argues (but only in a footnote) that Section 332 (c) (7) applies only to "wireless tower sites." Comments of the Wireless Communications Association International at 9, footnote 14. Such arguments are unavailing.

The plain language of the statute defining "personal wireless service facilities" noted above is not limited to wireless tower sites. Nonetheless the Wireless Communications Association argues for a "wireless tower site" limitation of Section 332 (c) (7) based on language in the House Report to the 1996 Act. The House Report cannot contradict the plain language of the statute. In any event the House Report is superceded by the language of the subsequent Conference Committee Report which states in pertinent part as to Section 332 (c) (7) follows:

> "It should be noted that the provisions relating to telecommunications facilities are not limited to commercial mobile radio licensees, but also will include other Commission licensed wireless common carriers such as point to point microwave in the extremely high frequency portion of a electromagnetic spectrum which rely on line of sight for transmitting communications services." H.R. Rep. No. 104-458, 104th Cong. 2d Sess. at 209 (1996) ("Conference Committee Report") (emphasis supplied).

Finally, the removal of Commission preemption authority is spelled out in the introduction to the pertinent Section of the Conference Committee Report which states as follows:

> "*Conference Agreement.* The conference agreement creates a new Section 704 which prevents Commission preemption of local and state land use decisions and preserves the authority of state and local governments over zoning and land use matters . . . The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. It is the intent of the conferees that other [than for certain RF matters] the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated." Conference Committee Report at 207-208. (emphasis supplied)

As set forth above, in the 1996 Act, Congress took the unusual step of requiring the

Commission to terminate then pending proceedings where the Commission was considering preempting local zoning and other authority over wireless facilities. Then a year later (1997) when the Commission started three proceedings to preempt state and local authority on wireless and HDTV matters[9] Congress responded in the confirmation hearings for Chairman Kennard and other Commissioners with strong questioning and criticism.

The message from Congress has been strong and repeated: The Commission lacks statutory authority to act on matters within the scope of Section 332 (c) (7) and generally should not preempt State and local authority.

As noted above some industry commenters have agreed that some fixed wireless facilities are within the scope of Section 332 (c) (7). Such commenters also may be contending or attempting to preserve a right to contend (their comments are unclear) that other fixed wireless facilities fall outside Section 332 (c) (7). Although the grounds for such claims are not made clear by industry comments they may be to the effect that certain providers are not "common carriers" (or if title to a wireless antenna is transferred to a tenant or third party then it is not part of a common carrier facility).

CCO believes that the simple answer is the following: In the unlikely event that some fixed wireless facilities are outside the scope of Section 332 (c) (7) there is no need for the Commission to act. This is because the protections provided by Section 332 (c) (7) reflect basic principles of zoning law present in most states. For example, Section 332 (c) (7) (B) prohibits "unreasonable discrimination" among "providers of functionally equivalent services." It is generally inherent in

[9]See Dockets DA96-2140; WT 97-192; MM97-182

zoning law that like facilities in like locations are treated alike.

Similarly, Section 332 (c) (7) (b) also states that states and local governments "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." Again a fundamental principle of zoning law is that an appropriate place must be found in a community for all legal uses.

Congress found that the principles set forth in Section 332 (c) (7) provide an appropriate balance between the need for the prompt provision of personal wireless services and local zoning requirements. Particularly given that there has been no demonstration of any actual adverse impact of zoning regulations on fixed wireless facilities, the Commission should not attempt to craft separate rules for any fixed wireless facilities that are largely identical to those covered by Section 332 (c) (7) (but arguably fall outside it such as due to technicalities of ownership).

2 **Section 253**: In paragraph 69 the Commission also requested comment on whether it has authority to act under Section 253. It does not.

First, Section 253 only applies to state or local actions which "may prohibit or have the effect of prohibiting" the ability of any entity to provide certain telecommunications services. Section 253 (a). As set forth above there has been no description at all in the comments to this proceeding of any impact of zoning or land use laws on the provision of telecommunications services, let alone a "prohibition of service." Thus, the threshold requirement of Section 253 (a) has not been met.

Second Section 253 (b) preserves "requirements necessary to. . . protect the public safety and welfare. . . and safeguard the rights of consumers" even if they prohibit the provision of telecommunications services. So even if industry providers were able to show instances where zoning or other laws "prevent" the provision of service (which they have not) zoning laws will still

stand because they are a classic example of public health, safety and welfare legislation, specifically adopted to protect the rights of consumers (among others).

Finally, Section 253 (d) requires the Commission to proceed on a case by case basis to preempt matters falling under Section 253 (a) or (b). It does not allow preemption by rulemaking. This occurs because Section 253 (d) only allows the Commission to preempt enforcement of "A state or local government...statute, regulation or legal requirement that violates subsection (a) or (b)" (emphasis supplied). The Commission thus must address regulations or other legal requirements on a case by case basis. This is reinforced by the other provisions of Section 253 (d)--for example, under it the Commission is only allowed to proceed "after notice and an opportunity for public comment." Rulemakings using Section 253 authority are not allowed.

Thus for the substantive and procedural reasons just described the Commission may not act under Section 253.

3 **Section 207**: The 1996 Act also expressly prevents preemption by the Commission under Section 207, Section 253 or other amendments made by that Act. This is due to Section 601 (c) (1) of the 1996 Act which provides as follows:

> "(1) No Implied Effect--This Act and the amendments made by this Act shall not be construed to modify, impair, or supercede, Federal, state or local law unless expressly so provided in such Act or amendments."

As the Conference Committee Report says with respect with Section 601 (c):

> "The Conference Agreement adopts the House provision stating that the bill does not have any effect on any other Federal, State or local law unless the bill expressly so provides. This provision prevents affected parties from asserting that the bill impliedly preempts other laws." Conference Committee Report at 201

Section 207 of the 1996 Act is relied upon by many industry commenters to argue that the

Commission has the authority to preempt state and local laws and regulations. However, Section 207 is part of Telecommunications Act of 1996. It relates only to devices to receive video programming. Due to Section 601 it is clear that Section 207 provides no basis for Commission preemption in the current instance.

IV. RULE CANNOT APPLY TO GOVERNMENT PROPERTY

A. Introduction: Wireless industry comments support wireless antennas being placed on the roofs of multi tenant residential and commercial buildings and wiring running from the ground floor of such buildings to individual tenants.

Numerous other commenters (landlords and others) have filed comments and letters in this proceeding opposing the wireless industry position. Extensive legal arguments have been presented as to why the Commission cannot and should not adopt the rule. CCO generally agrees with such comments opposing the rule and will not repeat them.

However, there are several independent reasons why any such rule, if adopted, cannot apply to property owned by the states or local units of government (or for that matter to property owned by Federal government) as described below.

B. No Demonstrated Problem: The comments filed in this proceeding overwhelmingly relate to problems fixed wireless providers have had obtaining building access from private landlords, not with public (local or state government owned) property. As indicated above there are over 30,000 units of local government in the United States, plus fifty states. These units of government own and control a wide range of properties from prisons and hospitals to administration buildings. Although these properties may be "multi-tenant" in one sense of the word they have unique attributes, are not a principle focus of this rulemaking and serve a public purpose. As is set

forth below there are (at minimum) serious statutory and constitutional issues should the Commission attempt to bring within the coverage of the rule properties owned by units of government.

The simplest resolution is that unless and until the Commission is presented with a record of problems of significant severity and frequency in the fifty states and over 30,000 municipalities nationwide involving the matters addressed by the rulemaking it should not make any rule applicable to such governmental properties. For the Commission to act otherwise (given that the wireless industry has been given ample opportunity to bring forth facts in this regard and has not done so) would be arbitrary, capricious and an abuse of discretion.

C. **Section 704 (c) Prevents Application to Government Property**: The Federal Telecommunications Act of 1996, as is well known, was intended to promote competition in telecommunications. As noted above many other provisions Congress included in the Act Section 704 (c) which provides as follows:

> (c) AVAILABILITY OF PROPERTY.--Within 180 days of the enactment of this Act, the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

As has been described above the GSA subsequently issued procedures implementing Section

704 (c).

However, Section 704 (c) and the subsequent GSA procedures would have been unnecessary if this Commission already possessed (or had conferred on it elsewhere in the 1996 Act) the authority it is now claimed to have: namely the authority to require the Federal government to allow the use of its "property, rights-of-way and easements. . . for the placement of new telecommunications services that are dependent . . . upon the utilization of Federal spectrum rights." Thus, if the Commission already had this authority, Section 704 (c) is surplusage.

Stated somewhat differently Congress has already expressly considered the issue of (1) whether Federal property should be made available for new, wireless and other telecommunications services, and (2) what entity within the Federal government should have the responsibility for specifying the procedures by which Federal property would be made available.

Congress selected the executive branch ("the President or his designee"), not this Commission, to promulgate such procedures. The GSA adopted them three years ago. Congress thus did not intend any role for this Commission regarding Federal property.

States and local units of government are addressed by the last sentence of Section 704 (c) which requires the Commission to provide "technical support" to states to "encourage" them to make "property, rights-of-way and easements available for new spectrum based telecommunication services purposes."

Congress thus recognized the issue of making state and local property available for new spectrum based telecommunications services and assigned the Commission the sole role of providing technical support. This Congressional directive to the Commission to "encourage" state and local units of government to make their property, easements and rights-of-way available for such services

is similarly surplusage if the Commission could compel the taking or use of local and state government property for such purposes.

Congress' recognition that at most the Federal government could "encourage" state and local governments to make their property available for new telecommunications services is appropriate. It avoids the severe constitutional problems described below if a Congressional mandate were attempted. It also recognizes the unique circumstances of public property. For example, airports are generally owned by units of state and local governments. They often have multiple tenants. Yet there is a significant safety concern due to the potential for interference of any fixed wireless facilities at airports with vital airport and airplane radio communications (or other electronic devices).

Other municipal buildings (including their roofs) have significant public artistic or architectural value. For example, the Kent County, Michigan administration building is located on the City/County Plaza. It has on its roof one of the last murals designed by the artist Alexander Calder. The mural accompanies and compliments a large stabile in the adjacent plaza. Placing any devices on the roof would significantly detract from a major artistic and architectural landmark, just as placing a wireless facility in the Hirschorn Sculpture Garden at the National Gallery would similarly be inappropriate.

D. Rule May Cause State and Municipal Bond Defaults: Application of the proposed rule to state and local government facilities financed by tax exempt bonds may cause such bonds to lose their tax exempt status, thus typically triggering a bond default and severe adverse consequences for the issuing unit of government and its residents. For this reason the Commission must exclude all state and local properties from the coverage of any rule.

1 **The Problem**: State and local bond law is extremely complex and extremely important. States and municipalities raise capital for new projects (schools, a police station or an environmental project) by borrowing money by issuing bonds. Such bonds are virtually always tax exempt (that is, the interest received by the bond holder (lender) is exempt from taxation under the Internal Revenue Code). The rules and restrictions applicable to such bonds are lengthy and complex[10] The fifty states and over thirty thousand units of state and local government collectively issue billions of dollars of bonds each year.

One of the principle Federal restrictions placed on such bonds is the effective usage of any of the proceeds by private taxable entities. For some bonds no more than ten percent of the bond issue may be used by private parties. Internal Revenue Code Section 141 (b)(1). For so called exempt facility bonds the limit is five percent and often is further restricted by a strict dollar cap. See generally Internal Revenue Code Section 142 (a) and following.

The Commissions rule contemplates the permanent physical occupation of affected properties by the facilities of the wireless or telephone providers. Under Loretto v Teleprompter Manhattan CATV Corp. any such occupation is a taking which is legal under the US Constitution only upon the payment of just compensation.[11]

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[10]For example, two of the principle sections applicable to such bonds are Sections 141 and 142 of the Internal Revenue Code. 26 USCA Sections 141 and 142 together with their statutory history and pocket parts occupy approximately 100 pages of the United States Code Annotated.

[11]Other parties have extensively briefed this issue. CCO will not further address it here other than the note that the comments submitted by multiple parties demonstrating that there is a taking requiring just compensation is correct.

Further, the Commission should be aware that the Supreme Court has repeatedly ruled that the takings clause of the US Constitution protects state and local governments from takings instigated by the Federal government, just as private parties are protected. See e.g.-- United States v Fifty Acres of Land, 469 US 24 (1984); United States v Carmac, 329 US 230 (1946).

Thus the Commission cannot compel the placement of antennas on the roofs of state or local government buildings or the placement of wires therein without paying compensation.

However, if the building has been financed with tax exempt bonds those bonds may lose their tax exempt status if the sums thus paid (in combination with other private party payments related to the facility in question) exceed the applicable ten percent (10%) (or five percent (5%)) limit set forth above. In this regard in general the Internal Revenue Code and accompanying regulations require computation of the present value of payments from private parties received or to be received over the life of the bonds financing the facility to determine whether the ten percent/five percent test is met. To reduce the overall cost to taxpayers and residents the entity issuing the bonds sometimes will have already arranged for long term usage and payment by private parties up to the maximum allowed by the Internal Revenue Code. Additional payments resulting from the Commission's rule would cause this cost limit to be exceeded.

Application of the proposed rule to state or local government property thus will sometimes place such governments in the difficult situation of choosing between (1) forgoing the significant compensation required by the Fifth Amendment from wireless and telecommunication providers related to placing their facilities on public property, and (2) risking a municipal bond default which can have severe or catastrophic consequences for a state or municipality, as set forth below. The Commission cannot and should not place state and local governments in such a situation.

As described above, depending upon the building, there may be tens or hundreds of new phone companies attempting to provide service to tenants under the Commission's rule. This may require extensive work on the building costing hundreds of thousands or millions of dollars to make the modifications necessary to extend wires to individual tenants.[12]

States and local governments should not be placed in a situation where they may have to forgo payment for such costs or other compensation which will cost the units of government substantial sums and would unfairly subsidize the provider.

Yet by accepting funds from the providers the state or local unit of government may risk their municipal bonds becoming taxable.

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[12]As noted above the NOPR and comments discuss condemning space inside buildings, if the existing space is insufficient for additional wiring. Such condemnation power is generally unavailable against property owned by units of state or local government under the "prior public use doctrine" of eminent domain law. Under this doctrine the property of an entity which has the right of condemnation cannot itself be condemned. Units of state and local government have the condemnation power. See for example, State Highway Commission v Township of St. Joseph, 48 Mich App 230 (1973)(Township property dedicated to public use may not be taken under general eminent domain statute by State Highway Commission); Florida East Coast Railway Co. v City of Miami, 321 So. 2d, 545 (Florida 1975)("Generally property held by an authority that has the power of condemnation cannot be taken by another authority with the same power of condemnation absent specific legislation"); City of Wilmington v Lord, 332 A. 2d. 407 (Delaware 1975). See generally, Annotation, Power of Eminent Domain as Between State and Subdivision or Agency Thereof or Between Different Subdivisions or Agencies Themselves, 35 ALR 3d. 1293; Annotation, Construction and Application of Rule Requiring Public Use for Which Property is Condemned to be More Necessary or Higher Use than Public Use to Which Property is Already Appropriated--State Takings, 49 ALR 5th. 769.

In addition, the Commission should be aware that in many states the condemnation power of utilities is circumscribed or non-existent. For example, in Michigan telephone companies have no rights of condemnation inside city limits. Outside city limits such rights are limited to railroad lines and subdivision lines. See generally MCLA Section 484.4, 484.9 and 484.10. In addition a number of courts have held in circumstances nearly identical to the proposed rule that the eminent domain power cannot be used to condemn space inside a building for wiring to be used by a private party. See e.g. City of Lansing v Edward Rose Realty, 442 Mich. 626 (1993).

The consequences of a municipal bond becoming taxable will typically range someplace between severe and catastrophic. Generally, if a municipal bond loses its tax exempt status it is an item of default such that (among other things) the bond issue in total becomes due and payable. Classically, if a bond issue goes into default (or loses its tax exempt status) the bond market (i.e. Wall Street or lenders) will either refuse to lend monies in the future to the entity in question or extract an extremely high premium--a very high interest rate--for doing so.

The financial demands of a default and being foreclosed from the financial markets has a severe financial impact on municipalities such as requiring them to fund capital facilities from cash flow which may require the reduction in essential public services. In some cases projects cannot be funded at all.

There is no way for the Commission to identify which state and local facilities have or have not been funded with tax exempt bonds. To prevent the major negative consequences on states, municipalities and their residents of municipal bonds defaults they must be exempted from the application of any proposed rule.

V. NO ABILITY TO PREEMPT

The Supremacy and the Necessary and Proper Clauses of the U.S. Constitution allow preemption of State and local legislation and regulations only where Congress intended Federal law to cover the entire "field" of regulation. The Federal preemption doctrine is succinctly articulated as follows:

> "Federal law may preempt State or municipal law when Congress so states in explicit terms on the face of a statute, if federal legislation is so comprehensive in a given case so as to leave no room for supplemental state or local legislation, or if local law actually conflicts with federal law or congressional purposes or goals." North

Haven Planning & Zoning Commission v. Upjohn Co., 735 F. Supp. 423 (D.C. Conn. 1990), aff'd 921 F.2d 27, cert. den. 500 U.S. 918, 111 S.Ct. 2016, 114 L.Ed.2d 102 (1990).

This statutory sections cited by commenters meet none of these requirements. As noted above several sections (Section 207 of the 1996 Act; Section 332 (c) (7); Section 253) are inapplicable; expressly deprived the Commission of all jurisdiction; or for substantive and procedural reasons do not apply to this proceeding. More generally there is nothing in the authority cited by the NOPR or commenters that expressly attempts to confer preemption authority on the Commission.

Relatedly, the Communications Act and related statutes are not so "comprehensive" as to leave no room for supplemental state or local legislation. Although the Communications Act may address telecommunications matters, it in no way addresses the safety code, health code, environmental, planning, zoning or land use matters described herein (and which historically are the exclusive province of state and local governments).

Finally, as has been demonstrated above, there is no showing (and probably can be no showing) of an actual conflict between the preceding state and local laws and the Telecommunications Act. The best evidence of this is the lack of any showing of an actual problem in these areas by the wireless or telecommunications industry.

In fact it is clear from the 125 year history of telephone and communication service in the US that there is an express place for state and local governments to supplement Federal legislation on safety code, health code, zoning and land use matters. For the better part of a century the local telephone company and building owners have complied with the National Electric Code and the

National Electric Safety Code (described above). They have complied with local zoning and land use laws. They have complied with other safety and health codes.

The preceding measures do not conflict with the Telecommunications Act and, in fact, share the common purpose of promoting "the safety of life and property." 47 USC Section 151.

VI. THE COMMISSION MUST COMPLY WITH EXECUTIVE ORDER 13, 132

On August 4, 1999 President Clinton signed Executive Order 13,132 titled "Federalism" (a copy of which is attached). In general the Executive Order covers all "policies that have Federalism implications" which include regulations such as those proposed in the NOPR which would have a substantial direct effect on the states or on the relationship between the national government and states. See Executive Order Section 1 (a). States expressly includes units of local government. See Section 1 (b).

The Executive Order recognizes that our constitutional system "encourages a healthy diversity in the public policies adopted by the people of the federal states" and recognizes that "one-size-fits-all" approaches to public policy problems can inhibit the creation of effective solutions to those problems." Executive Order Section 2 (f). The Executive Order sets forth a series of strict standards and actions to which the Commission must adhere. These include:

- "Strict adherence to constitutional principles." See Section 3 (a). As is set forth herein constitutional principles prohibit the preemption of health and safety-related codes, zoning regulations or application of any rule to state or local government property.
- State and local officials must be extensively consulted before any action is implemented. See Executive Order Sections 3 (a) 3 (b) and 4 (d) among others.

- Agencies may preempt state or local law "only where the statute contains an express preemption provision or where there is some other clear evidence that the Congress intended preemption of state law." Section 4 (a).
- Any preemption "shall be restricted to the minimum level necessary to achieve the objectives of the [Federal] statute." Section 4 (c).
- Both government departments and independent agencies should comply with the Order. Section 9.

The Executive Order was adopted approximately one month after the NOPR was issued. The Executive Order, however, by its terms applies to the NOPR and the Commission must comply with it as this proceeding goes forward.

The Commission's common practice in rulemakings and other proceedings involves significant numbers of meetings and consultation with telecommunications industry officials. Presumably such contacts and meetings and consultation will occur with the wireless industry and other telecommunications providers in this rulemaking.

In order to comply with the Executive Order the Commission and its staff must have meetings and consultations with state and local officials which overall are as meaningful and extensive as Commission and staff meetings with industry officials.

In addition, for the reasons set forth herein the rule may not be adopted as proposed because it conflicts with the provisions of the Executive Order set forth above.

VII. PREEMPTING SAFETY CODES, ZONING CODES OR APPLYING THE RULE TO STATE AND LOCAL GOVERNMENT PROPERTY VIOLATES THE TENTH AMENDMENT

A. Historical Background and Recent U.S. Supreme Court Opinions

Over two centuries ago, the United States Constitution was adopted creating a dual system of government for our nation. One of the strengths of that Constitution was that it created a central government of limited powers, reserving the balance of sovereign authority to the individual states. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt X. James Madison expressed it this way:

> "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State government are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 2399, 115 L. Ed. 2d 410 (1991) (citing The Federalist No. 45, pp. 292-293). The Court went on to explain the significant advantages to this dual system of governance:

> "This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic process; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." [Supporting citations omitted.]
>
> "Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by our Framers to ensure the protection of 'our fundamental liberties'" . . . Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Gregory, *supra*, at pp. 111 St. Ct. at 2399-2400 (supporting authority omitted).

Although acknowledging the limits of this dual system of government, the Court nevertheless affirmed the importance of federalism to the preservation of our civil liberties:

> "One can fairly dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. If this "double security" is to effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty."

Gregory, *supra*, at p. 2400 (emphasis added).

One year after the Gregory opinion, the Supreme Court again underscored the continuing viability of the Tenth Amendment. In New York v. United States, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), the Court invalidated a Federal statute, the Low-Level Radioactive Waste Policy Act, as being inconsistent with the Tenth Amendment. In that opinion, the Court acknowledged the tautological nature of the Tenth Amendment, but nevertheless reaffirmed its significance to constitutional jurisprudence:

> "The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power."

New York, *supra*, 112 S. Ct. at 2418 (emphasis added). This was consistent with what the Court had earlier said, when it stated:

> "This has been the Court's consistent understanding: 'The States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."

Id., citing Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 549, 105 S. Ct. 1005, 1017 (1985). It is for that reason, said the Court, that neither the Federal government nor a state government may "curtail in any substantial manner the exercise of [the other's] powers." New York, *supra*, 112 S. Ct. at 2421. "[U]nder our Federal system, the States possess sovereignty concurrent with that of the Federal Government." Id., citing Tafflin v. Levitt, 493 U.S. 455, 458, 110 S. Ct. 972, 975, 102 L. Ed.2d 887 (1990) (emphasis added).

Three years later, the Supreme Court again addressed the scope of Federal power under the Commerce Clause in connection with the Federal Gun Free School Zones Act, a Federal statue that would have made it a federal offense for any individual to knowingly possess a firearm within 1,000 feet of a school. In U.S. v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), the Court again affirmed the principle of limited Federal powers, citing from some of our earliest and most respected jurists:

> "As Chief Justice Marshall stated in McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (1819):
>
> > "The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist." Id., at 405.
>
> See also Gibbons v. Ogden, 9 Wheat., at 195 ("The enumeration presupposes something not enumerated"). The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. See U.S. CONST., Art. I, § 8. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the judiciary's duty "to say what the law is." Marbury v. Madison, 1 Cranch. 137, 177, 2 L. Ed. 60 (1803) (Marshall, C.J.). Any possible benefit from eliminating this "legal uncertainty" would be at the expense of the Constitution's system of

enumerated powers."

U.S. v. Lopez, *supra*, 115 S. Ct. at 1633.

The Supreme Court's concern is similar to that of the CCO in the present case, i.e., that the Federal government will attempt to usurp the general police powers ordinarily reserved to the states. The Court was very concerned that it not:

> ". . . convert Congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . . The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf Gibbons v Ogden, *supra*, at 195, and that there never will be a distinction between what is truly national and what is truly local, cf *Jones & Laughlin Steel, supra*, at 30, 57 S. Ct., at 621. This we are unwilling to do."

115 S. Ct. at 1634 (emphasis added).

This emphasis on what is national and what is local was reiterated in the recent opinion of Printz v. U.S., 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997). After briefly discussing the historical background to our dual system of government, the Court in Printz wanted to emphasize its conclusion:

> "It suffices to repeat the conclusion: 'The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. . . . The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from an incursion by the other" -- "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it" . . . As Madison expressed it: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."

Printz, *supra*, 117 S. Ct. at 2377 (extensive list of supporting authorities omitted).

Finally, just this past June, the Supreme Court again acknowledged the constitutional limitations on federal power over the states. Reaffirming the "inviolable sovereignty" of the States and the continuing relevance of the Tenth Amendment, the Court stated:

> "Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes States as sovereign entities.' [supporting authorities omitted] Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance. [supporting authorities omitted] The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design, see, e.g., Art. I, §8; Art. II, §§2-3; Art. III, §2. Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'"

Alden v. Maine, 119 S. Ct. 2240, 2247 (1999), citing U.S. Const., Amdt. 10; other supporting citations omitted.

B. Zoning Matters are Peculiarly Local and May Not be Preempted: The proposed rule would violate the Tenth Amendment of the U.S. Constitution by intruding on an area of peculiarly local concern.

Under the proposed rule (especially if the Star Lambert/Meade, Kansas decision is applied under it) many zoning and land use ordinances may be preempted or curtailed. This is an unconstitutional infringement on a traditional attribute of State sovereignty, namely land use regulation. The U.S. Supreme Court has stated that the regulation of land use is a function "traditionally performed by local government." Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 115 S.Ct. 395, 130 L.Ed.2d 245 (1994). Other opinions of the Supreme Court have

supported this general proposition. For example, in City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 115 S.Ct. 1776 at 1786, 131 L.Ed. 2d 801 (1995), Justice Thomas summarized the law as follows:

> "It is obvious that land use -- the subject of petitioner's zoning code -- is an area traditionally regulated by the States than by Congress, and that land use regulation is one of the historic powers of the States. As we have stated, 'zoning laws and their provisions are peculiarly within the province of State and local legislative authorities.'" *Citing* Warth v. Seldin, 422 U.S. 490 508 n. 18, 95 S.Ct. 2197, 2210 n. 18, 45 L.Ed. 2d 343 (1975); *see also* Hess, *supra*; FERC v. Mississippi, 456 U.S. 742, 768 n. 30, 102 S.Ct. 2126, 2142 n. 30, 72 L.Ed. 2d 532 (1982) ("Regulation of land use is perhaps the quintessential state activity"); Village of Belle Terre v. Boraas, 416 U.S. 1, 13, 94 S.Ct. 1537, 1543, 39 L.Ed. 2d 797 (1974) (Marshall, J. dissenting. "I am in full agreement with the majority that zoning...may indeed be the most essential function performed by local government").

A municipality's protection of the public health, safety and welfare of its residents by adopting zoning laws applicable to property and the wireless dishes on them is a clear example of a municipality engaged in the "quintessential state activity" of zoning which is considered the "most essential function performed by local government." The FCC may not preempt local zoning and land use ordinances when such ordinances are used by municipalities to formulate and implement local legislative policy for the protection of the public health, safety and welfare of its residents. Thus the Commission's proposed rule or any variant of it is unconstitutional.

C. **Health and Safety Matters are Peculiarly Local and May Not be Preempted**:

Similarly, the Supreme Court has noted that the regulation of health and safety matters is primarily and historically a matter of local concern. See, e.g., Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 719, 105 S. Ct. 2371, 2378, 85 L. Ed. 2d 714 (1985). Prior portions of these comments have set forth in detail the critical public safety and public health matters

addressed by safety codes and safety related codes. Much as with zoning and land use ordinances they are adopted by municipalities to protect the public health, safety and welfare. These are often matters of peculiarly local concern where the contents of the codes often have to be altered to meet local conditions. An important part of such codes are the means determined by the legislative body of a municipality or state as the most effective and appropriate means for their enforcement.

Thus, the Commission proposed rule or any variant of it is unconstitutional to the extent it affects any state or local safety related code or health code.

D. <u>The Proposed Rule May Not Apply to State and Government Properties</u>: Under our dual sovereign structure of government the Federal government, under the principles set forth above, may not intrude on (among other things) the internal organizations of state and local governments or their relations with their citizens.

The most common tenants in state and local government buildings are other units of state and local government. It is an impermissible intrusion on the sovereignty of such state and local governments for the Federal government to mandate the legal arrangements amongst them.

Similarly, state and local governments at substantial expense provide housing of various sorts for citizens in distress (hospitals, low-income) or in need of incarceration (prisons, jails). It is constitutionally impermissible for the Federal government to dictate the terms on which this may occur, especially if such provisions may help undermine the fundamental powers and purposes of state and local government by (see discussion above) in some instances by requiring state and local governments to choose between financial harm (not being paid by a wireless or telecommunication providers) and financial calamity (a municipal bond default).

VIII. CONCLUSION